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2013 IL App (3d) 110444-UB

Order filed May 24, 2013
Modified Upon Denial of Rehearing February 19, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-11-0444
) Circuit No. 07-CF-1554
MARTIN E. GOMEZ,)
) Honorable
Defendant-Appellant.) Richard C. Schoenstedt,
) Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction is vacated, and the cause remanded for a new trial in compliance with Illinois Supreme Court Rule 401(a).
- ¶ 2 After a jury trial, defendant, Martin E. Gomez, was convicted of one count each of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), armed robbery (720 ILCS 5/18-2(a)(1) (West 2006)), and home invasion (720 ILCS 5/12-11(a)(2) (West 2006)). The trial court sentenced defendant to a total of 55 years of imprisonment. On appeal, defendant argues that the trial court

erred when it: (1) failed to properly admonish him in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984); and (2) ordered defendant to submit to and pay for a deoxyribonucleic acid (DNA) analysis. We vacate defendant's conviction and remand the cause for further proceedings.

¶ 3

FACTS

¶ 4 On July 27, 2007, defendant was charged by criminal complaint with two counts of first degree murder. The trial court appointed the public defender and advised defendant that he had been charged with two counts of first degree murder that carried a sentencing range of 20 years to natural life in prison without the possibility of parole or the death penalty.

¶ 5 On August 23, 2007, the complaint was superseded by an indictment that charged defendant with four counts of first degree murder, one count of armed robbery, and one count of home invasion. At the arraignment, defense counsel waived a formal reading of the bill of indictment.

¶ 6 On August 12, 2008, defendant filed a motion to dismiss his public defender. The trial court denied the motion, noting the seriousness of the charged offenses and the technical aspects of the case. Defendant filed a motion to reconsider citing, in part, Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). The court denied the motion.

¶ 7 At a March 2009 hearing, defendant objected to defense counsel's motion for a continuance. Defendant argued that he had several issues with counsel. The court directed defendant to submit the matters in writing.

¶ 8 On May 14, 2009, defendant filed a motion "to allow the defendant to address the court and the record." Defendant's motion argued that he was "invoking his right to *** Rule 401

waiver of counsel." On July 23, 2009, defense counsel moved the court to set the case for trial. Defendant objected and argued that counsel had not visited him when asked, did not plan to call an expert witness, and did not intend to call defendant's witnesses to testify. The court questioned defendant about his age and level of education, and advised defendant that counsel had several years of training and experience. The court asked counsel to confer privately with defendant in an effort to resolve the issues, and advised defendant that proceeding *pro se* was a "real bad idea." After the conference, defendant restated his desire to proceed *pro se*. The court declined to rule on defendant's motion and continued the case to allow counsel to attempt to locate and hire an expert witness.

¶ 9 On August 25, 2009, defense counsel stated that he had unsuccessfully attempted to retain an expert witness on cellular telephone triangulation. As a result, counsel requested that the case be set for trial. Defendant objected, asserting that counsel had tried to go to trial without a necessary expert witness, and defendant wished "to invoke [his] rights and waive counsel." The court advised defendant that proceeding *pro se* was a "bad idea," but stated that defendant had a right to represent himself. Defendant advised the court that he planned to file motions to appoint an investigator and an expert witness, and to suppress evidence and quash arrest. The court appointed standby counsel and granted defendant's motion to proceed *pro se*.

¶ 10 On March 28, 2011, the case proceeded to a jury trial. Prior to trial, defense counsel stated that the "sum and total of [his] involvement has been to answer just a few relatively minor questions that [defendant] has asked" and that he had not given any advice or been asked for any advice regarding strategy. The jury found defendant guilty of all counts, and the court entered convictions, as aforesaid. The trial court sentenced defendant to a total of 55 years of

imprisonment and entered an order for costs. The cost sheet imposed a \$200 DNA database analysis fee. Defendant appeals.

¶ 11

ANALYSIS

¶ 12

I. Supreme Court Rule 401(a)

¶ 13 Defendant argues that his convictions and sentences should be reversed and the cause remanded for a new trial because the trial court failed to admonish him in accordance with Rule 401(a) before it permitted him to proceed *pro se*.

¶ 14 The State argues that defendant has waived review of this issue. However, defendant's contention involves the possible denial of a substantial right and therefore is subject to plain error review. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999); *People v. Black*, 2011 IL App (5th) 080089; *People v. Jiles*, 364 Ill. App. 3d 320 (2006). We review the issue on appeal *de novo*. *People v. Campbell*, 224 Ill. 2d 80 (2006).

¶ 15 The sixth amendment of the United States Constitution entitles a defendant to the representation of counsel. U.S. Const., amends. VI, XIV. A defendant may waive this right only if he voluntarily, knowingly, and intelligently elects to do so. *Campbell*, 224 Ill. 2d 80. A court shall not permit a waiver of counsel by a defendant accused of an offense punishable by imprisonment without addressing defendant in open court and informing him of and determining that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law; and (3) that he has a right to counsel, and if he is indigent, to have counsel appointed for him by the court. Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 16 Under limited circumstances, a valid waiver of counsel may be effected if the trial court substantially complied with Rule 401(a). *People v. Koch*, 232 Ill. App. 3d 923 (1992). Illinois

court have recognized at least three broad categories of substantial compliance. In the first, the absence of a detail, presumably insignificant, does not impede a defendant from giving a knowing and intelligent waiver. One such case is *People v. Johnson*, 119 Ill. 2d 110 (1987) (Admonitions failed to state the minimum sentence). In the second category, the defendant was seen as possessing a degree of knowledge of sophistication that excused the lack of admonition. See, for example, *People v. Houston*, 174 Ill. App. 3d 584 (1988) (defendant displayed knowledge and training as a paralegal, excusing admonition), and, in the third, proper admonishments given to the defendant within a “reasonable” time prior to his waiver request may be sufficient compliance. See *People v. Ray*, 130 Ill. App. 3d 362 (1984) (a five day lapse between the issuance of the admonishment and waiver of counsel did not result in reversible error).

¶ 17 We note that substantial compliance generally excuses a trial court’s failure to follow an uncomplicated and undemanding three-part rule. This effectively shifts the burden onto defendants to fully understand their right to counsel and comprehend, without benefit of the admonitions required by the supreme court, the ramifications of waiving this right. The course of action apparently contemplated by Rule 401(a) is for trial courts to make its admonitions part of their standard response when a defendant seeks to waive his right to counsel. Such a practice ensures that defendants are adequately and timely informed of their rights and the consequences of exercising them, that they make a knowing and voluntary waiver of those rights, and that the trial court fulfills its obligation under Supreme Court Rule 401(a). As the supreme court has noted, the language of Rule 401(a) “could not be clearer[.]” *Campbell*, 224 Ill. 2d at 84. Nor are the court’s rules “merely suggestions to be complied with if convenient but rather obligations

which the parties and the courts are required to follow.” *People v. Reed*, 376 Ill. App. 3d 121, 125 (2007). See also *Campbell*, 224 Ill. 2d at 87.

¶ 18 Here, the trial court failed to admonish defendant in accordance with Rule 401(a) before he proceeded *pro se*. Specifically, the court did not admonish defendant of the charges, the sentencing range, and his right to counsel. Although defendant was notified of the charges in the criminal complaint, defense counsel waived a formal reading of the superseding bill of indictment. Additionally, there is no indication that the trial court later apprised defendant of the additional counts of armed robbery and home invasion that were charged in the superseding indictment.

¶ 19 Finally, we note that the presence of standby counsel did not eliminate the need for the Rule 401(a) admonitions. Counsel stated that the extent of his involvement was to answer a few minor questions, and that he had not provided any advice to defendant regarding trial strategy. As a result of this limited involvement, we do not find that defendant received the technical assistance of counsel. *Cf. People v. Nieves*, 92 Ill. 2d 452 (1982) (where defendant sought and was granted the technical assistance of counsel, defendant need not be given all of the required admonishments under Rule 401(a)). On such a record, we do not find that defendant made a knowing and voluntary waiver of his right to counsel. Therefore, we vacate defendant's convictions and remand the cause to the trial court for Rule 401(a) admonitions and a new trial.

¶ 20 II. DNA Analysis Fee

¶ 21 Next, defendant argues that the trial court erred in imposing a DNA analysis fee because his presentence investigation report stated that his DNA had been registered after a prior conviction. However, we find that our remand on the Rule 401(a) issue has rendered this issue

moot.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Will County is vacated, and the cause is remanded for a new trial.

¶ 24 Vacated and remanded with instruction.